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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 FRASER ROTCHFORD,

7 Plaintiff,

8 v.

9 DISCOVERY BEHAVIORAL HEALTH,

10 Defendants.

Case No. C19-360 RJB-TLF

REPORT AND RECOMMENDATION

Noted for **July 17, 2019**

11 Plaintiff Fraser Rotchford filed a civil rights complaint with this Court on May 22, 2019.
12 Plaintiff is proceeding *pro se* and *in forma pauperis* in this matter, which has been referred to the
13 undersigned Magistrate Judge. *Mathews, Sec’y of H.E.W. v. Weber*, 423 U.S. 261 (1976); 28
14 U.S.C. § 636(b)(1)(B); Local Rule MJR 4(a)(4). The Court declined to serve the complaint
15 because it contained numerous deficiencies. The Court ordered that he either amend his
16 complaint or show cause as to why it should not be dismissed for failure to make a claim, giving
17 plaintiff until June 21, 2019, to correct the deficiencies in his complaint. Dkt. 10. Plaintiff was
18 further advised that if the amended complaint was not filed or if it failed to adequately address
19 the deficiencies identified by the Court, the undersigned would recommend dismissal of this
20 action under 28 U.S.C. § 1915, as frivolous or for failure to state a claim, and the dismissal
21 would count as a “strike” under 28 U.S.C. § 1915(g). *Id.* To date, plaintiff has not amended his
22 complaint or otherwise responded to the Court’s order. For reasons set forth below, plaintiff’s
23 complaint remains fatally deficient.

1 Accordingly, the undersigned recommends that the Court dismiss this action without
2 prejudice prior to service for failure to state a claim upon which relief may be granted.
3 Alternatively, if the Court declines to adopt the above recommendation, the undersigned
4 recommends the action be dismissed without prejudice based on plaintiff's failure to comply
5 with a court order and prosecute his case. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir.
6 1992), *as amended* (May 22, 1992) (“[T]he district court may dismiss an action for failure to
7 comply with any order of the court.”)

8 I. DISCUSSION

9 The Court must dismiss the complaint of a prisoner proceeding *in forma pauperis* “at any
10 time if the [C]ourt determines” that the action: (a) “is frivolous or malicious”; (b) “fails to state a
11 claim on which relief may be granted” or (c) “seeks monetary relief against a defendant who is
12 immune from such relief.” 28 U.S.C. § 1915(e)(2); 28 U.S.C. § 1915A(a), (b). A complaint is
13 frivolous when it has no arguable basis in law or fact. *Franklin v. Murphy*, 745 F.3d 1221, 1228
14 (9th Cir. 1984).

15 Before the Court may dismiss the complaint as frivolous or for failure to state a claim,
16 though, it “must provide the [prisoner] with notice of the deficiencies of his or her complaint and
17 an opportunity to amend the complaint prior to dismissal.” *McGuckin v. Smith*, 974 F.2d 1050,
18 1055 (9th Cir. 1992); *see also Sparling v. Hoffman Construction, Co., Inc.*, 864 F.2d 635, 638
19 (9th Cir. 1988); *Noll v. Carlson*, 809 F.2d 1446, 1449 (9th Cir. 1987). On the other hand, leave to
20 amend need not be granted “where the amendment would be futile or where the amended
21 complaint would be subject to dismissal.” *Saul v. United States*, 928 F.2d 829, 843 (9th Cir.
22 1991) (citing *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir.1990); *Moore v. Kayport*
23 *Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir.1989)).

1 To state a claim under 42 U.S.C. § 1983, a complaint must allege: (1) the conduct
2 complained of was committed by a person acting under color of state law, and (2) the conduct
3 deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the
4 United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels*
5 *v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged
6 wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th
7 Cir. 1985).

8 The Court identified several deficiencies in plaintiff’s complaint and provided him an
9 opportunity to cure those deficiencies as described below. Dkt. 10.

10 A. *Failure to State a Claim*

11 To determine whether a private actor acts under color of state law for § 1983 purposes,
12 the Court looks to whether the conduct causing the alleged deprivation of federal rights is “fairly
13 attributable” to the state. *Price*, 939 F.2d at 707–08. Conduct may be fairly attributable to the
14 state where (1) it results from a governmental policy and (2) the defendant is someone who fairly
15 may be said to be a governmental actor. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826,
16 835 (9th Cir. 1999). A private actor may be considered a governmental actor if the private actor
17 conspires with a state actor or is jointly engaged with a state actor when undertaking a prohibited
18 action. *Tower v. Glover*, 467 U.S. 914, 920 (1984). Receiving federal funding and being required
19 to follow certain federal regulations does not turn a private entity into a government actor. *See*
20 *Witmer v. Greater Lakes Mental Healthcare*, No. C15-5039 BHS, 2016 WL 1161689, at *3
21 (W.D. Wash. 2016) (unpublished).

22 In his complaint, Plaintiff has not alleged facts from which it may be fairly determined
23 that Discovery Behavioral Health was acting under color of state law. While plaintiff refers to
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1 the organization as an “agency,” defendant appears to be not a state actor but a private business
2 that provides counseling services to jail inmates. Dkt. 9-1, p. 3. In addition, plaintiff makes no
3 allegations that defendant conspired or acted in concert with a state actor.

4 Furthermore, plaintiff names only Discovery Behavioral Health as a defendant. Dkt. 1-1,
5 p. 2. From the facts alleged, it appears that defendant is a private company that provides
6 counseling to some inmates at Jefferson County Jail. Dkt. 1-1, p. 3. As noted above, plaintiff
7 fails to set forth facts to show defendant was acting under color of state law at the time of the
8 alleged harm.

9 Plaintiff appears to allege that defendant as an entity, or individuals who were working
10 for the defendant, denied him treatment after he had been “the target of abuse at the jail in 2018.”
11 *Id.* at pp. 3-4. However, plaintiff has not identified specific acts and omissions of individuals
12 who work for the defendant entity. And he has not named such individuals as defendants. *See*
13 *Castro v. City of Los Angeles*, 833 F.3d 1060, 1067-1072, 1073-78 (9th Cir. 2016) (en banc). In
14 seeking to hold the entity liable, he has not alleged a policy, pattern, or practice causing a
15 violation of his constitutional or statutory rights. *Los Angeles Ct., Cal. v. Humphries*, 562 U.S.
16 29, 34 (2010). He has not identified specific dates when individuals committed their acts or
17 omissions or when he was harmed by a policy, pattern, or practice of the entity. And he has not
18 satisfied the requirement that he establish causation—by showing that the acts or omissions of
19 individual defendants, or the policies, practices, or customs of an entity such as a municipality,
20 caused a constitutional deprivation. *Castro v. City of Los Angeles*, 833 F.3d 1060, 1075.

21 Liberally construing the complaint, plaintiff does not allege specific facts that, if true,
22 would demonstrate a violation of any federal constitutional or statutory right. Accordingly,
23 plaintiff has not stated a claim against the defendant under § 1983.

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Plaintiff was advised that if he filed an amended complaint he should write out short, plain statements telling the Court: (1) the constitutional right plaintiff believes was violated; (2) the name of the person (defendant) who violated the right; (3) exactly what that person did or failed to do; (4) how the action or inaction of that person is connected to the violation of plaintiff's constitutional rights; and (5) what specific injury plaintiff suffered because of that person's conduct. *See id.*; *Rizzo v. Goode*, 423 U.S. 362, 371–72 (1976).

II. CONCLUSION

Because plaintiff already has been granted the opportunity to state a viable constitutional claim by filing an amended complaint – but plaintiff has failed to amend his complaint, respond to the Court, or otherwise prosecute his claim– dismissal of this action is for failure to state a claim under 42 U.S.C. § 1983 is proper.

Because plaintiff already has been granted the opportunity to state a viable constitutional claim by filing an amended complaint – but plaintiff has failed to amend his complaint, respond to the Court, or otherwise prosecute his claim– dismissal of this action is for failure to state a claim under 42 U.S.C. § 1983 is proper.

1 The parties have **fourteen (14) days** from service of this Report and Recommendation to
2 file written objections thereto. 28 U.S.C. § 636(b)(1); Federal Rule of Civil Procedure (FRCP)
3 72(b); *see also* FRC P 6. Failure to file objections will result in a waiver of those objections for
4 purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed
5 by Fed. R. Civ. P. 72(b), the Clerk is directed set this matter for consideration on **July 17, 2019**,
6 as noted in the caption.

7 Dated this 3rd day of July, 2019.

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11 Theresa L. Fricke
12 United States Magistrate Judge
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